Filed 2/18/05 P. v. Cubillos CA6

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. JERARDO CUBILLOS, Defendant and Appellant.	H027224 (Santa Clara County Super. Ct. No. EE223129)

On August 29, 2003, an information filed in the Santa Clara County Superior Court charged appellant Jerardo Cubillos with receiving stolen property (Pen. Code, § 496, subd. (a)). In addition, the information alleged that appellant took property worth over $150,000 (Pen. Code, § 12022.6, subd. (a)(2)) and was ineligible for probation absent unusual circumstances (Pen. Code, § 1203.045).

On February 11, 2004, the jury found appellant guilty of the offense of "attempted possession of stolen property."[1] (Pen. Code, §§ 496, subd. (a) & 664.) Furthermore, the jury found true the allegation that appellant took property with a value exceeding $150,000.

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[1] The jury verdict form reflects that they found appellant guilty of "ATTEMPTED POSSESSION OF STOLEN PROPERTY, in violation of PENAL CODE SECTION 664/496(a)." The abstract of judgment reflects that appellant was found guilty of attempted "Buying, Receiving, Concealing or Withholding Property."

On March 8, 2004, the court sentenced appellant to a term of five years consisting of three years for the attempted receiving stolen property count and two years for the enhancement for taking property over $150,000 (Pen. Code, § 12022.6 subd. (a)(2)).

Appellant filed a notice of appeal on March 8, 2004.

On appeal appellant contends that the jury committed reversible error in finding true the allegation under Penal Code section 12022.6. Thus, the court should not have imposed the consecutive two-year prison term. We agree and strike the two-year enhancement.

Facts

On September 27, 2002, Thomas Antonich, a diamond sales representative for Leby Corporation and IV Designs, was robbed while staying at the Motel 6 in Sunnyvale. Jewelry with a wholesale value of $800,000 and retail value of approximately $ 1.5 million was stolen. Each piece of jewelry had an industry trademark "L" stamped on it. The pieces had jewelry tags on them designating the diamond weight.

Sunnyvale Police Detective Luke Itano notified Los Angeles Police Detective Michael Woodings and FBI Special Agent Frank Aimaro, assigned to the Interstate Theft Task Force, of the Sunnyvale jewelry robbery.[2] The task force attempted to locate Pedro Sandoval, a known participant in organized theft groups. On October 8, 2002, the police conducted surveillance of Sandoval. The police followed Sandoval's car to the Good Night Inn in Sylmar. At approximately midnight, uniformed officers knocked on the door to room 115. The police found Eustasio Esguirra, appellant, and Sandoval in the room. Woodings knew Sandoval from prior contacts, but he did not know appellant.

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[2] According to Detective Woodings, in the Los Angeles area, the San Fernando Valley and the Rampart area are places where organized theft groups reside. The robbers dump the victims' luggage near the crime scene and transport the stolen goods in other luggage.

Sandoval acknowledged that he rented the room with a fictitious name and consented to a search of the room.

In the room, the police found a backpack, a green nylon bag with a return airline ticket to Florida in the name of Gerardo Palacio,[3] and a jeweler's loupe. A second jeweler's loupe was found around appellant's neck. Inside the bag, the police recovered papers with handwritten notations of numbers and a jeweler's scale. In addition, in the room the police found a handheld calculator, gold rings, tags, a pen, plastic bags with jewelry, black luggage, two diamond testers, another scale and an ice bucket containing numerous items of jewelry bearing jewelry tags. The markings on the recovered jewelry were consistent with the markings on the jewelry taken in the Sunnyvale robbery.[4] The hotel room smelled of marijuana and the police recovered a small amount of marijuana from the room. The total wholesale value of the jewelry found in the hotel room was approximately $458,000.

Discussion

As noted, the jury found appellant not guilty of buying, or receiving stolen property (Pen. Code, § 496, subd. (a)). However, the jury did find appellant guilty of attempted possession of stolen property (Pen. Code, § 664/496, subd. (a)). In addition, the jury found true the allegation that appellant took, damaged, or destroyed property with a value exceeding $150,000.

Essentially, appellant contends that it was error for the jury to find the taking allegation true when it found him not guilty of receiving stolen property. Appellant argues that there was no evidence that he touched any of the stolen jewelry in a way that

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[3] There is some confusion in the record as to whether the name was Gerardo or Jerardo. A boarding pass in the name of Jerardo Palacio was found on appellant's person. When interviewed by the probation officer, however, appellant indicated that his name is spelled with a "G".

[4] Antonich was able to identify approximately 850 pieces of jewelry as having been taken from him in Sunnyvale.

destroyed or damaged it. Thus, since he never took possession, and there was no evidence that he ever touched the stolen jewelry, he could not have damaged or destroyed the stolen jewelry.

Penal Code section 12022.6 provides: "(a) When any person takes, damages, or destroys any property in the commission or attempted commission of a felony, with the intent to cause that taking, damage, or destruction, the court shall impose an additional term as follows: . . . [¶] (2) If the loss exceeds one hundred and fifty thousand dollars ($150,000), the court, in addition and consecutive to the punishment prescribed for the felony or attempted felony of which the defendant has been convicted, shall impose an additional term of two years."

The People argue that the "language in the statute unequivocally includes all felonies . . . ." Relying on *People v. Superior Court* (*Kizer*) (1984) 155 Cal.App.3d 932, the People argue that the statute applies to receiving stolen property. Thus, "there is no reason to exclude an attempt to commit the same crime, where, as here, the language of the statute specifically includes attempts to commit any felony."

In *People v. Superior Court* (*Kizer*), *supra*, 155 Cal.App.3d 932 (*Kizer*), the defendants were charged with offenses arising from the theft of integrated circuits, including theft, receiving stolen property and attempting to receive stolen property, and with enhancements of " 'excessive taking' " pursuant to Penal Code section 12022.6. (*Id*. at p. 934.) In the trial court, the defendants moved to strike the " 'excessive taking' " allegations on the receiving and attempted receiving counts. The motion was granted and the People appealed. (*Ibid*.)

In *Kizer*, the defendants contended that Penal Code section 12022.6[5] applied only to the theft of property and not to receiving stolen property on the theory that a defendant may not be convicted of both stealing and receiving the same property. (*Kizer*, *supra*,

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[5] Unless noted, all undesignated statutory references are to the Penal Code.

155 Cal.App.3d at p. 935.) The First District Court of Appeal framed the issue as one of whether section 12022.6 could be applied only to the "initial taker" of the property. (*Ibid*.)

After examining the meaning of the word "take" and concluding that " '[s]teal' is but one meaning of the word 'take,' " the First District Court of Appeal concluded that the "purpose of the statute is clearly served by imposing the enhancement upon the receiver of stolen property." (*Kizer, supra*, 155 Cal.App.3d at p. 935.) The court concluded that the legislative history of section 12022.6 revealed "an intent of the Legislature consistent with the application of the statute to receivers of stolen property. Section 12022.6 was added to the code in 1976 and required that a taking or property damage must be an element of the crime for which the enhancement was to be imposed. (Stats. 1976, ch. 1139, § 305.5, p. 5162.) In 1977 the section was amended. The additional punishment is now imposed if such a loss occurs during the commission or attempted commission of *any* felony. The expanded reach of the enhancement is not consistent with a narrow construction of the word 'takes.' " (*Id*. at pp. 935-936.)

The section 12022.6 enhancement applies only if appellant took, damaged or destroyed property. Thus, section 12022.6 provides that the enhancement may be given to "any person [who] takes . . . property . . . with the intent to cause that taking."

"In determining the meaning of the word 'take' as used in section 12022.6, we follow the rule that '[c]ourts should first look to the plain dictionary meaning of the [word] . . . .' [Citation.]" (*People v. Loera* (1984) 159 Cal.App.3d 992, 1001.) "The dictionary definition of 'take' is 'to get into one's hands or into one's possession . . . .' (Webster's Third New Internat. Dict. (1961) p. 2329.)" (*People v. Kellett* (1982) 134 Cal.App.3d 949, 958-959.)

Accordingly, we conclude that in order to "take" property a defendant must

possess the property either actually or constructively.[6] (See *People v. Loera*, *supra*, 159 Cal.App.3d at p. 1001.)

Physical possession of property by a defendant is not necessary to constitute receipt of stolen goods. (*People v. Bugg* (1962) 204 Cal.App.2d 811.) The prosecution must show, however, that a defendant had either actual or constructive possession. (*People v. Jolley* (1939) 35 Cal.App.2d 159.) The jury's not guilty verdict on the receiving count does not preclude such a finding because the jury could have found that appellant received the property, but did not know that it was stolen.[7] The jury's guilty verdict on only *attempted* possession, however, does preclude such a finding in this case because an attempt implies that that which one seeks to accomplish has failed.[8]

Since section 12022.6 refers to "take" and not "attempting to take," we must conclude that a guilty finding on only attempted possession of stolen property/attempt to receive stolen property prevents a finding of excessive taking under section 12022.6 where as here there is no question that the jewelry was stolen.

We do not hold that in every case an attempt to receive stolen property precludes an excessive taking enhancement. We can envision a case in which a defendant "takes" property, that is possesses it, but is convicted only of attempted receipt of stolen property because the goods were not stolen. (See e.g. *People v. Rojas* (1961) 55 Cal.2d 252, 258, [one who receives ["takes"] stolen property believing it to be stolen when in fact it has already been recovered by the police is guilty of an attempt to receive stolen property].)

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[6] With respect to whether appellant destroyed or damaged property, nowhere in the record was it shown that appellant touched the jewelry in any way that destroyed or damaged the jewelry.

[7] In order to prove the crime of receiving stolen property two elements must be proved: A person received property which had been stolen and that person actually knew the property was stolen at the time he or she received the property. (CALJIC No. 14.65.)

[8] The dictionary definition of "attempt" is "to make an effort to do, accomplish, solve or effect . . . with implications of failure." (Webster's Third New Internat. Dict. (1993) p. 140.)

In this case, we conclude that the jury's true finding on the section 12022.6 allegation contradicts its verdict that appellant was guilty of only attempted possession of stolen property. (Pen. Code, § 496, subd. (a).) Therefore, the trial court erred in imposing a two-year sentence for the 12022.6 allegation. For that reason, we strike the two-year enhancement from appellant's sentence.

Disposition

The judgment is modified to strike the section 12022.6 enhancement. The trial court is directed to amend the abstract of judgment accordingly and forward a certified copy of the amended abstract to the Department of Corrections. As modified, the judgment of conviction is affirmed.

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ELIA, J.

WE CONCUR:

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RUSHING, P. J.

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PREMO, J.